86-2071

No.

Supreme Court, U.S.
FILED
JUN 12 19
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK J. VERDERBER,

Petitioner,

vs.

CANTELLO PLUMBING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANK J. VERDERBER
Pro se
3 Kinsale Street
Toms River, New Jersey 08757
(201) 244-1676

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Whether the provisions of 11 U.S.C. §§ 547 (c)(2), prohibiting a trustee from demanding return of payments to regular business creditors for debts incurred in the regular course of business, should be upheld.

II. Whether the provisions of 11 U.S.C. §§ 547 (g) requiring a trustee to prove insolvency, should be upheld.

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UNITED STATES CODE INVOLVED

11 U.S.C. § 547, Preferences.

(b) Except as provided in subsection (c), a trustee may avoid a transfer made while debtor was insolvent.

Pages 338 & 339, USCA, West Pub Co. show more than 50 cases wherein the courts, including appellate courts of 10 different states have held: "It is elementary to the definition of a forbidden preference that it must have been made while debtor was insolvent".

(c)(2) The trustee may not avoid a transfer made in payment of a debt incurred in the ordinary course of business.

(g) The trustee has the burden of proving the avoidability of a transfer under subsection (b).

Pages 581 & 582, USCA, West Pub Co. show more than 50 cases wherein courts, including appellate courts of 17 different states have held: "The burden of proof is on the trustee to prove by preponderance of evidence all of the essential elements of a voidable preference."

OPINIONS BELOW

The Court of Appeals entered its decision affirming the denial of petitioner's request for reversal on April 15, 1987. A copy of the decision is attached as Appendix A-1

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on May 13, 1987. A copy of the order is attached as Appendix A-3

JURISDICTION

On April 15, 1987, the Court of Appeals entered judgment affirming the denial of petitioner's motion for reversal. The Jurisdiction of ths Court is invoked under Title 28, United States Code §§ 1254 (1).

STATEMENT OF THE CASE

Petitioner was accountant/bookkeeper for Cantello Plumbing Corporation from 1968 to May 15, 1985.

When Mr. Nicholas F. Cantello, then 84 years of age, decided to retire, a petition for orderly dissolution of the business under Chapter 11 was filed on January 14, 1984. Attached to the petition was a financial statement which indicated that assets exceeded liabilities by $139,000, indicating a solvent financial condition.

During October 1984, Max H. Schloff, Esquire, a member of Ravin, Greenberg & Zackin, attorneys for Cantello, asked for a list of payments made to creditors during the 90-day period preceding the filing of the Chapter 11 petition and indicated that such payments would be voided as preferences. Petitioner then

told Mr. Schloff there were no preferences in that Cantello was solvent at all times prior to the petition and that payments to creditors were for debts incurred in the regular course of business. There can be no preferences if debtor was solvent at the time of payment, and 11 U.S.C. §§ 547 (c)(2) prohibits a trustee from voiding payments made in the regular course of business, whether debtor was solvent or insolvent at the time of payment.

Despite numerous warnings of the solvent condition of Cantello, Mr. Schloff wrote a series of letters to 36 regular business creditors in which Mr. Schloff falsely stated that Cantello was insolvent at the time payments amounting to $104,000 to them during the 90-day period preceding the date the Chapter 11 petition was filed, and fraudently demanded that the amount of the payments be returned. The names and

amounts of the 36 regular business creditors are shown on page 9 of the Appendix of Appellant. to Brief

During January 1986, Mr. Schloff filed a Notice of Proposed Settlement of a Controversy with Trane and Water Works. The notice had a clause to the effect that if there were no objections, the settlements would automatically be approved without a court hearing. Petitioner, having full knowledge of the financial condition and other matters of Cantello, entered an objection in writing to the settlements and stated as the basis of the objection to the settlements was the solvency of Cantello at all times prior to the said petition and that the payments to Trane and Water Works, and the other 75 regular business creditors were for debts incurred in the regular course of business. Such evidence was presented at the hearing without

objection by Mr. Schloff, who in turn, offered no proof of insolvency of debtor on October 26, 1983, or on November 16, 1983 when Water Works and Trane respectively were paid, or on any of the other days that the other 34 regular business creditors were paid.

Despite the fact that Mr. Schloff was unable to prove insolvency and despite the fact that the demands for return of payments to Trane and Water Works were illegal, the Bankruptcy Court approved the "settlements".

ARGUMENTS

It is contended that the so- called "settlements" with Trane and Water Works are part of a scheme to circumvent the provisions of 11 U.S.C. §§ 547 (g) which require trustee to prove insolvency. Trane and Water Works were selected for this purpose as Trane has an out-of-town address and Water Works involves a small amount. The matter then was filed in the Bankruptcy Court as if it were an ordinary case of controversy as opposed to the instant case where returns of payments to Trane and Water Works are prohibited by 11 U.S.C. §§ 547 (c)(2). As stated, the notice of proposed settlement contained a clause which indicated that if there were no objections, the settlement would be consummated. In the latter event, Mr. Schloff would be relieved of the

burden of proving insolvency. Petitioner firmly believes that schemes as described herein to circumvent the provisions of 11 U.S.C. §§ 547 (g) and so avoid the necessity of proving insolvency should be outlawed.

The scheme to avoid having to prove insolvency apparently was successful in that the Bankruptcy Court approved the settlement, the District Court affirmed the orders of the Bankruptcy Court, and the 3rd Circuit Court of Appeals affirmed the judgment of the District Court. Such approval and affirmations in effect give judicial approval to the making of false statements of insolvency, approve violations of 11 U.S.C. §§ (c)(2) which prohibits making demands for return of payments made in the regular course of business, and violates the provisions of 11 U.S.C. §§ 547 (g) which requires trustee

to prove all elements of 11 U.S.C. §§ 547 (b) including insolvency.

It further is contended that inclusion of the word "preference" in the orders prepared by Mr. Schloff for the Bankruptcy Court and the District Court falsely imply that Mr. Schloff actually had proven insolvency, and copies of such orders can be exhibited by Mr. Schloff to influence other creditors to return perfectly legal payments and use the same scheme in other cases.

The judgment order of the 3rd Circuit Court of Appeals is in conflict with the more than 100 cases mentioned on page iii of this document, wherein many courts, including appellate courts of 22 states, have held that "It is elementary to the definition of a forbidden preference that it must have been made by the debtor while insolvent",

and, "The burden of proof is on the trustee to prove by preponderance of evidence all of the essential elements of a voidable preference".

CONCLUSION

For the foregoing reasons, petitioner Frank J. Verderber prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Frank J. Verderber
Pro se

DATED:
June 23, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5691

IN THE MATTER OF:

CANTELLO PLUMBING CORPORATION,
Debtor

CANTELLO PLUMBING CORPORATION

v.

THE TRANE COMPANY
WATER WORKS SUPPLY COMPANY

FRANK J. VERDERBER,
Appellant

SUR PETITION FOR REHEARING

Present: Gibbons, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, Circuit Judges, and VAN DUSEN, Senior Circuit Judge

The petition for rehearing filed by

Frank J. Verderber, appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the court in banc, is denied.

BY THE COURT,

A. Leon Higginbotham
Circuit Judge

Dated: May 13, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5691

IN THE MATTER OF:

CANTELLO PLUMBING CORPORATION,
Debtor

CANTELLO PLUMBING CORPORATION

v.

THE TRANE COMPANY
WATER WORKS SUPPLY COMPANY

FRANK J. VERDERBER
Appellant

Appeal from the United States District Court for the District of New Jersey-Newark
(D.C. Civil Action No. 86-2645)
Honorable Dickinson R. Debevoise
District Judge

Submitted under Third Circuit Rule 12(6)
March 3, 1987
Before:
HIGGINBOTHAM, SLOVITER and VAN DUSEN
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by Appellant, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

A. Leon Higginbotham
Circuit Judge

Attest:

Sally Mrvos, Clerk

DATED: Apr 15, 1987

HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 86=2645

In the Matter of: CANTELLO PLUMBING CORPORATION: A New Jersey Corporation Case: Debtor	No. 84=00246
CANTELLO PLUMBING CORPORATION, Plaintiff vs. THE TRANE COMPANY, Defendant	Adversary No.85-0036
CANTELLO PLUMBING CORPORATION; Plaintiff, vs. WATER WORKS SUPPLY COMPANY, Defendant	Adversary No.85=0039
FRANK J. VERDERBER Appellant vs CANTELLO PLUMBING CORPORATION, Appellee	ORDER AFFIRMing MAR 20 1986 ORDERS OF BANKRUPTCY COURT

This matter having been brought before the Court on appeal of Frank J. Verderber from March 20, 1986 Orders of the Bankruptcy Court approving the settlements of the Debtor's preference actions against The Trane Company and Water Works Supply Company, and the Court having considered the briefs and argument of the Debtor's attorneys and the said Frank J. Verderber, and the Court having issued a bench opinion on September 8, 1986; and good cause appearing for the making and

entry of this Order, as set forth in the said opinion:

IT IS on this 25th day of September, 1986;

ORDERED, that the Orders approving the settlements of the Debtor's preference actions against The Trane Company and Water Works Supply Company, which were entered by the Bankruptcy Court on March 20, 1986, are hereby affirmed.

DICKINSON R. DEBEVOISE, U.S.D.J.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
BANKRUPTCY No. 84=--248

In the Matter of:

CANTELLO PLUMBING CORPORATION,
a New Jersey Corporation,
Debtor

CANTELLO PLUMBING CORP.
A New Jersey Corporation,
Debtor

CANTELLO PLUMBING CORP.
A New Jersey Corporation
Plaintiff,
vs
THE TRANE COMPANY,
Defendant.

In Proceedings for a reorganization under Chapter 11 of the BANKRUPTCY CODE

Adversary No. 85-0036

HONORABLE D. JOSEPH DEVITO

ORDER APPROVING SETTLEMENT OF PREFERENCE ACTION AGAINST THE TRANE CO.

This matter being opened to the Court by Ravin, Greenberg & Zackin, P.A., attorneys for Cantello Plumbing Corp, a New Jersey Corporation, Debtor-in-Possession; and it appearing to the Court that the Debtor heretofore instituted an action against The Trane Company to set aside a voidable preference in the amount of $7,330.60, pursuant to §547 (b) of the Federal Bankruptcy Code; and it further appearing that the Debtor and The Trane Company reached an agreement and understanding for the settlement and the

adjustment of their difference as hereinafter set forth; and it further appearing that the Clerk of this Court gave notice to all creditors and other parties in interest of the proposed settlement of the above-mentioned preference action for the sum of $5,000.00; and it further appearing that Frank J. Verderber filed a timely objection to the said proposed settlement and requested a hearing thereon; and the Court having considered the arguments of the Debtor's attorneys and the said Frank J. Verderber in support of their respective positions at the February 4, 1986 hearing on the aforementioned objection; and due cause being shown for the making of the within Order:

IT IS on this 20th day of March 1986;

ORDERED, that the above mentioned proposed settlement of the preference action of the Debtor against The Trane Company for the sum of $5,000.00 be and is hereby approved.

HONORABLE D. JOSEPH DEVITO
Bankruptcy Judge

DATED 3/20/86

UNITED STATES BANKRUPTCY COURT
FOR THE DIS RICT OF NEW JERSEY
BANKRUPTCY No. 84=00248

In the Matter of: CANTELLO PLUMBING CORP. A New Jersey Corporation, Debtor	In Proceedings for a reorganization under Chapter 11 of the Bankruptcy Code
CANTELLO PLUMBING CORP. A New Jersey Corporation Plaintiff, vs. WATER WORKS SUPPLY COMPANY Defendant	Adversary No. 85=0039 HONORABLE D. JOSEPH DEVITO ORDER APPROVING SETTLEMENT OF PREFERANCE ACTION AGAINST WATER WORKS SUPPLY COMPANY

This matter being opened to the Court by Ravin, Greenberg & Zackin, P.A., attorneys for Cantello Plumbing Corp, a New Jersey Corporation, Debtor-in-Possession; and it appearing to the Court that the Debtor heretofore instituted an action against Water Works Supply Company to set aside a voidable preference in the amount of $2,321.05, pursuant to §547(b) of the Federal Bankruptcy Code; and it further appearing that the Debtor and Water Works Supply Company reached an agreement and understanding for the settlement and the adjustment of their differences as hereinafter set forth; and it further

appearing that the Clerk gave notice to all creditors and other parties in interest of the proposed settlement of the above mentioned preference action for the sum of $1,392.63; and it further appearing that Frank J. Verderber filed a timely objection to the said proposed settlement and requested a hearing thereon; and the Court having considered the arguments of the Debtor's attorneys and the said Frank J. Verderber in support of their respective positions at the February 4, 1986 hearing on the aforementioned objection; and due cause being shown for the making of the within Order;

IT IS on this 20th day of March 1986

ORDERED, that the above mentioned proposed settlemtn of the preference action of the Debtor against Water Works Supply Company for the sum of $1,392.63 be and is hereby approved.

HONORABLE D. JOSEPH DEVITO
Bankruptcy Judge

DATED: 3/20/86